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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 457

NATHAN CHIARELLI AND SAM SERRITELLA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 152-157) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1951 (R. 158). The petition for a writ of certiorari was filed on December 3, 1951. The jurisdiction of this Court is invoked

under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the Government sufficiently proved all the elements of the offenses charged, including venue.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 11-13.

STATEMENT

An indictment containing three counts (R. 2-4) was returned against petitioners jointly in the United States District Court for the Northern District of Illinois. Count one (R. 2-3) charged a violation of 26 U.S.C. 2553(a) in that, on January 28, 1950, at Chicago, Illinois, they purchased, from unknown persons, 177 grains of heroin, a derivative of opium, which was not in or from the original stamped package. Count two (R. 3) charged a violation of 21 U.S.C. 174 in that, at the same time and place, they fraudulently and knowingly received, concealed, bought, and facilitated the transportation and concealment of such heroin, knowing it to have been illegally imported into the United States. Count three (R. 3-4) charged that, at the same time and place, they conspired to commit the offenses alleged in the first two counts, in violation of 18 U.S.C. 371.

Both petitioners, having waived a jury trial (R. 5-7), were tried together and found guilty on all three counts (R. 139-143). Chiarelli was sentenced

to three years' and Serritella to five years' imprisonment on each count, the terms to run concurrently (R. 143). On appeal, the judgments of conviction were affirmed (R. 158).

The evidence introduced by the Government may be summarized as follows:

On January 28, 1950, two members of the Narcotics Section of the Chicago Police Department, having been informed that two men, operating a certain described vehicle, were suspected of delivering packages of narcotics, observed petitioners pull up in a vehicle answering the given description in the vicinity of Calumet Avenue and 41st Street in the City of Chicago, Illinois (R. 9-12, 18, 20-21, 45-47). Serritella was driving and Chiarelli was seated beside him (R. 13, 21, 24-25, 59). The officers drove up alongside petitioners' automobile[1] as Chiarelli emerged with a package under his arm (R. 12, 14, 21, 22, 24-25, 47, 49-52). Wallace, exhibiting his badge to Serritella, identified himself as a police officer (R. 12, 22, 24). Making known his official capacity officer Page, gun in hand, proceeded after Chiarelli, who discarded his package and began to run (R. 47-48, 49-52). Meanwhile, Serritella rammed his car against the officer's vehicle and sped away (R. 12-14, 22, 37,

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[1] It was shown that in November, 1949, petitioners, using the name of Tony Capolo, bought a vehicle, which they later traded-in for the automobile in which they were riding (R. 66-68, 69-73, 77, 95). The latter vehicle was also registered with the Secretary of State of Illinois under the name of Tony Capolo (R. 15, 44, 61, 64-65, 95).

38, 47, 53-54). Chiarelli was arrested at the scene, and the discarded package was retrieved by officer Page (R. 16, 25, 48, 51, 52).[2] Subsequently, the Chicago police surrendered Chiarelli and the package to the custody of the federal narcotic agents, who took over the case (R. 16-17, 48, 57, 78-79, 80-81, 88).[3] The package consisted of newspaper wrapping, which contained five one ounce cellophane bags of heroin hydrochloride (R. 16-18, 48, 78-79, 80-81, 87, 89). Two of those bags bore fingerprint impressions of Serritella (R. 82, 90, 92-94). No stamps evidencing the payment of tax were affixed, either to the package or to any of the cellophane envelopes contained therein (R. 14, 48, 82).

Petitioners did not testify in their own behalf.[4] They moved for judgments of acquittal at the close of the Government's case, and again at the close

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[2] After his arrest Chiarelli stated to the police that the package was given him in a nearby Chicago restaurant by a colored man, who paid him $50 to deliver it to an address on Calumet Avenue (R. 14, 48-49, 60, 63-64).

[3] About a month later, Serritella was apprehended by a federal narcotics agent in a Chicago tavern, while in the company of Chiarelli (R. 79, 81-82).

[4] Petitioners, on cross-examination of the police officers, brought out the fact that, after a warning shot fired by Page had failed to halt Chiarelli, Wallace, before giving chase to Serritella, fired a shot which brought Chiarelli down with a wound, just as he was about to turn a corner (R. 29-32, 38-41, 48, 52-54). It was also shown that while Wallace was questioning Chiarelli in the back of his car, following his return to the scene from his unsuccessful pursuit of Serritella, his gun had been accidently discharged, with the spent pellet lodging itself harmlessly in the rear-seat cushion (R. 25-26, 28-29, 32-34, 41, 48, 55-56, 58-59). With an announced purpose to

of all the evidence; the motions were denied (R. 100, 111).

ARGUMENT

Petitioners do not deny that while in each other's company in Chicago, Illinois, one of them had in his physical possession a package, which contained a quantity of heroin hydrochloride. They complain that, relying solely upon statutory presumptions from possession, without proving their knowledge of the contents of the package and without otherwise proving a proper venue, the Government convicted them of the crimes of purchasing tax-unpaid heroin, of concealing and transporting it with knowledge that it had been illegally imported, and of a conspiracy to commit such offenses (Pet. 16-44). We submit that the Government has proved, as to each petitioner, all the elements of each offense charged in the indictment. Moreover, if the evidence is sufficient to sustain the conviction on any one count, the sentences im-

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discredit the testimony of the police officers, petitioners called an expert, whom the court permitted to testify, over objection, solely to explain the testimony relative to their flight, since such evidence, if unexplained, might be considered a circumstance of guilt (R. 102-103). The expert testified that he had examined Chiarelli, who told him that the bullet wound sustained by him was caused by Wallace's discharge of the firearm in the rear of his car, and that in his opinion Chiarelli's version of the shooting was consistent with the type of wound inflicted (R. 103-107). However, on cross-examination, he admitted that from the nature of the wound, it also could have been inflicted at the time Wallace shot at Chiarelli while he was fleeing (R. 107-108). Petitioners abandoned this issue as one of their grounds on appeal to the court below (R. 154), and they expressly elect not to make it an issue in their present petitions (Pet. 3; but see Pet. pp. 43, 44).

posed on petitioners would remain undisturbed, since they were imposed on the whole indictment and do not exceed the maximum that could have been given under any one count. *Powers* v. *United States,* 223 U. S. 303, 312; *United States* v. *Hornstein,* 176 F. 2d 217, 219 (C.A. 7); *United States* v. *Empire Packing Co.,* 174 F. 2d 16, 19 (C.A. 7), certiorari denied, 337 U. S. 959; cf. *Claassen* v. *United States,* 142 U. S. 140, 146.

1. Possession of proscribed narcotics is, under the statutes involved (See Appendix, *infra,* pp 11-13), sufficient to make out a *prima facie* case of commission of the offenses charged in counts one and two. Petitioners' argument that this statutory presumption does not supply proof of venue has been consistently rejected by the courts. *Casey* v. *United States,* 276 U. S. 413; *Frazier* v. *United States,* 163 F. 2d 817, affirmed, 335 U. S. 497; *Anderson* v. *United States,* 189 F. 2d 202 (C.A. 6). Moreover, as to count two, there was affirmative evidence that the drugs had been transported to Chicago. *Supra,* p.p. 3-4.

2. Petitioners' claim that there was no proof that Serritella had possession of the drugs (Pet. 19-20) is clearly without merit. The narcotics physically held by Chiarelli were actually within the joint possession of both petitioners. The uncontroverted evidence shows that the newspaper-wrapped package containing the drugs was transported, on the day involved, in the vehicle driven

by Serritella, whose fingerprints appeared on two cellophane envelopes, containing heroin, found inside the package (R. 12-14, 21-22, 24-25, 47, 59, 82, 87, 89, 90, 92-94). Coupled with the other evidence showing concerted movements of Serritella and Chiarelli, the fingerprint evidence was entirely competent and strongly persuasive in connecting Serritella with the narcotics. Indeed, Serritella aided in the transportation of Chiarelli, whose possession of the contraband was incidental to such transportation. Thus viewed, the evidence sufficed to warrant the inference of joint possession on the part of petitioners. *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U. S. 811; *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U. S. 584; *Colletti* v. *United States*, 53 F. 2d 1017 (C.A. 6), certiorari denied, 285 U. S. 559.

3. The contention that the Government failed to prove knowledge of the nature of the contents of the package (Pet. 21-23) is also without merit. Chiarelli's act of discarding the package and fleeing on the approach of the police was evidence of his guilty knowledge, just as Serritella's act in ramming the officer's car in an effort to escape is strongly indicative of guilty knowledge on his part (R. 12-13, 14, 22, 48, 52). These were inferences which the trier of the facts was entitled to draw. *United States* v. *Feinberg*, 123 F. 2d 425 (C.A. 7);

Rendleman v. *United States,* 38 F. 2d 779, 780 (C.A. 9). Petitioners contend, however, that when the Government introduced evidence of Chiarelli's statement that he had been given $50 to deliver the package, the Government had vouched for the truth of that statement exactly as if it had made Chiarelli its own witness, thereby sufficiently explaining his possession so as to vitiate the statutory presumption (Pet. 36-40). This contention is untenable. The Government introduced Chiarelli's explanation to show the high degree of improbability of the existence of a satisfactory explanation, and, alternatively, to permit an inference therefrom that he must have been aware of the illicit character of the package's content, for he could not have been so naive as to think that a stranger would pay him $50 to perform a simple, innocent errand. Assuming, *arguendo,* that the Government is bound by the statement, the explanation did not automatically overcome the Government's *prima facie* case against petitioners. To do so it had to satisfy the trier of the facts that the possession was free from criminal taint. *Gonzales* v. *United States,* 162 F. 2d 870 (C.A. 9). Here, as the trier of facts presumably found, the explanation of possession was not satisfactory.

4. 26 U. S. C. 2551(a) exempts from the operation of 26 U. S. C. 2553(a), the statute on which count one was founded, the possession of preparations which do not contain more than one-eighth

of a grain of heroin. Petitioners argue (Pet. 26-30) that the Government failed to negative that exception. However, each of the five envelopes containing the heroin was physically exhibited to the trial judge, who was satisfied that there was a sufficient quantity to bring it within the purview of section 2553(a). Moreover, the burden was on petitioners to prove that they came within the exemption of that statute. The Government was not required to negative the exempion. *United States* v. *Holmes,* 187 F. 2d 222, 225 (C.A. 7), certiorari denied, 341 U. S. 948; cf. *McKelvey* v. *United States,* 260 U. S. 353, 357.

Petitioners argue (Pet. 28) that heroin is not a "derivative" of opium since it is derived, not from opium directly, but by a chemical action on morphine which in turn is a derivative of opium. They state that by definition the term derivative is limited to an immediate product of a given substance. Clearly, Congress did not intend to use the term "derivative" in any such limited sense. The courts have taken judicial notice that heroin is a derivative of opium. *United States* v. *Holmes,* 187 F. 2d 222, 225 (C.A. 7); *Hughes* v. *United States,* 253 Fed. 543, 545 (C.A. 8), certiorari denied, 249 U. S. 610. Nor was there any error because of the allegation of heroin in the indictment and the proof that the substance possessed by petitioners was heroin hydrochloride. This merely means that the heroin was mixed with hydrochlo-

ride. See United States Dispensatory (1947), p. 358.

5. Petitioners' contention (Pet. 31-35) that the Government failed to prove the conspiracy alleged in count three is without merit. The evidence set forth in the Statement shows an abundance of circumstances involving petitioners' concerted actions, which, coupled with the events of January 28, 1950, justified an inference that there was a tacit agreement between them to violate the federal narcotic statutes. *United States* v. *Kissel,* 218 U. S. 601, 607, 608; *United States* v. *Glasser,* 116 F. 2d 690, 699-700 (C.A. 7), reversed in part, 315 U. S. 60; cf. *Direct Sales Co.* v. *United States,* 319 U. S. 703. The evidence was more than sufficient to establish overt acts within the district where venue was laid (R. 12-14, 21-22, 24-25, 47, 49-52).

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

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JANUARY 1952.

APPENDIX

Statutory Provisions

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

21 U. S. C. 174 (38 Stat. 275, as amended, 42 Stat. 596, provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of

the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U. S. C. 2550(a) (53 Stat. 269, as amended, 60 Stat. 39) provides:

> There shall be levied, assessed, collected, and paid upon opium, isonipecaine, coca leaves, opiate, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

26 U. S. C. 2551(a) (53 Stat. 270) provides in pertinent part as follows:

> The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which

are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided,* That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: * * *

26 U. S. C. 2553(a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

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